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Obligations

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THE "NEW AND IMPROVED" CLAIM FOR UNJUST ENRICHMENT—CODIFIED

Since *Minyard v. Curtis Products, Inc.*,[1] the *actio de in rem verso* or unjust enrichment claim has surfaced in the reporters.[2] Fundamentally, the demand has its foundation in a civil law notion of equity—that one person should not unfairly profit at another's detriment. Given the vague parameters of this touchstone of rough justice, the Supreme Court of Louisiana, in *Edmonston v. A-Second Mortgage Co.*,[3] established five criteria for a person to pursue the action successfully, including the important standard that there is no other remedy available at law. Thus, for nearly twenty years the courts have spoken with a uniform voice in describing the unjust enrichment claim as subsidiary in nature and subject to strict limitations.[4]

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1. 251 La. 624, 205 So. 2d 422 (1967). *See* John A. St. Clair, *Actio De In Rem Verso in Louisiana:* Minyard v. Curtis Products, Inc., 43 Tul. L. Rev. 263 (1969).

2. *E.g.*, Morphy, Makofsky & Masson, Inc. v. Canal Place 2000, 538 So. 2d 569 (La. 1989); Kirkpatrick v. Young, 456 So. 2d 622 (La. 1984); Creely v. Leisure Living, Inc., 437 So. 2d 816 (La. 1983); Fogleman v. Cajun Bag & Supply Co., 638 So. 2d 706 (La. App. 3d Cir.), *writ denied*, 644 So. 2d 375 (1994); Charrier v. Bell, 496 So. 2d 601 (La. App. 1st Cir.), *writ denied*, 498 So. 2d 753 (1986); Safeco Ins. Co. v. Farm Bureau Ins. Cos., 490 So. 2d 565 (La. App. 3d Cir. 1986); Ettinger v. Greenleaf, 483 So. 2d 1116 (La. App. 5th Cir. 1986); Cabral v. CIB Invs., Inc., 433 So. 2d 897 (La. App. 5th Cir. 1983); Succession of Skye, 417 So. 2d 1221 (La. App. 3d Cir.), *writ denied*, 422 So. 2d 165 (1982); Johnson v. Hospital Affiliates Int'l, Inc., 416 So. 2d 207 (La. App. 1st Cir. 1982); Marceaux v. Town of Lake Arthur, 415 So. 2d 610 (La. App. 3d Cir. 1982); G. Woodward Jackson Co. v. Crispens, 414 So. 2d 855 (La. App. 4th Cir. 1982).

3. 289 So. 2d 116 (La. 1974). *See* Albert Tate, Jr., *The Louisiana Action for Unjustified Enrichment*, 50 Tul. L. Rev. 883 (1976) [hereinafter *Unjustified Enrichment*]; Albert Tate, Jr., *The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process*, 51 Tul. L. Rev. 446 (1977) [hereinafter *Judicial Process*]; Stewart M. Thomas, *Conditions for the Application of Actio De In Rem Verso*, 36 La. L. Rev. 312 (1975).

4. Illinois Cent. Gulf R.R. v. Deaton, Inc., 581 So. 2d 714, 717 (La. App. 4th Cir.), *writ denied*, 588 So. 2d 1117 (1991) (stating that "the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature") (quoting *Minyard*, 251 La. at 652, 205 So. 2d at 432); Sheets v. Yamaha Motors Corp., 849 F.2d 179, 184 (5th Cir. 1988) (same); *Ettinger*, 483 So. 2d at 1119 (same); Roberson Advertising Serv., Inc. v. Winnfield Life Ins. Co., 453 So. 2d 662, 665 (La. App. 5th Cir. 1984) (listing as the fifth element "an absence of a remedy at law"); *Cabral*, 433 So. 2d at 900 (same); *G. Woodward Jackson Co.*, 414 So. 2d at 856 (same); Austin v. North Am. Forest Prods., 656 F.2d 1076, 1088 (5th Cir. 1981) (stating that "the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature") (quoting *Minyard*, 251 La. at 652, 205 So. 2d at 432).

During its regular session in 1995, the Louisiana Legislature on the recommendation of the Louisiana State Law Institute passed Act 1041, originally House Bill 713. Act 1041 amends and reenacts Articles 2292 through 2313 of the Civil Code of 1870 as revised Articles 2292 through 2305—treating obligations arising without agreement or sometimes known as quasi-contracts.[5] In addition, in Section 1 of Chapter 2 of Title V of the Revised Civil Code, the legislature codified the unjust enrichment claim:

> A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. *The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.*
>
> The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.
>
> The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.[6]

This essay explores the *actio de in rem verso* set forth in the Revised Civil Code in three ways: its source (and, as a consequence, its limitations); the measure of recovery; and its invocation in three types of situations.

A. The Source of the Action

The Civil Code of 1870 commenced with a clear declaration of the positive nature[7] of its contents: "Law is a solemn expression of legislative will."[8] Article 3 of the Civil Code of 1870 identified custom as a secondary source of law.[9] To

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5. Article 2293 of the Civil Code of 1870 defined quasi-contracts as "the lawful and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties." Two quasi-contracts flow from the management of another's affairs (the negotiorum gestio) and the payment of a thing not due. La. Civ. Code arts. 2295, 2301 (1870). Both of these arrangements are included in the revised articles. La. Civ. Code arts. 2292-2297, 2299-2305.

6. La. Civ. Code art. 2298 (emphasis added).

7. The "characteristic of written law is that it represents with respect to the rule of law it enacts the authority of a specific social organ, cast in a verbal form which sets its contours and defines its content binding for all." Francois Gény, Methode d'Interprétation et Sources en droit privé Positif, no. 92, at 165 (La. State L. Inst. trans. 1954).

8. La. Civ. Code art. 1 (1870). Article 2 of the Civil Code continues this concept.

9. In its current form, Article 3 of the Revised Civil Code reads as follows: "Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation." *See* William T. Tete, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 Tul. L. Rev. 1 (1973).

address the "unprovided for case,"[10] Article 21 stated as follows: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."[11] Both ordinal and logical perspectives demonstrate that the redactors of the Civil Code envisioned judges resorting to custom only when no legislation exists and when the behavior at issue falls within well-defined guides of societal expectations. One often cited illustration is a bride assuming her spouse's family name.[12] With even greater force, the courts should decline any invitation to resort to equity except in rare instances when no legislation reasonably covers the matter in dispute and when a judicial failure to act will result in manifest injustice.[13] One commentator offered the following approach for a court receiving a plea for equity: (1) examine the statutory law, (2) "'plumb the depths' of the dispositions of written law," (3) proceed "*ex aequo et bono*," or according to equity and conscience, and then (4) "supplement [ ] the law."[14]

B. The Elements of the Claim

Against this truncated and simplified backdrop, the Supreme Court of Louisiana recognized and outlined the *actio de in rem verso* in its seminal decisions in *Minyard* and *Edmonston*. The language of the *Edmonston* opinion is significant in at least three respects. First, it denotes the action as a "remedy . . . founded upon principles . . . in Civil Code articles 21 and 1965 . . . used to fill a gap in the law. . . ."[15] Second, it admonishes the courts not to turn "to equity to remedy every unjust displacement of wealth with unregulated discretion. . . ."[16] Third, it contains the five requirements for a person to pursue the claim successfully:

> 1) There must be an enrichment; 2) there must be an impoverishment; 3) there must be a connection between the enrichment and the impoverishment; 4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment; and 5) the action will only be

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10. *See* Mitchell Franklin, *Equity in Louisiana: The Role of Article 21*, 9 Tul. L. Rev. 485 (1935); Ferdinand F. Stone, *The So-Called Unprovided for Case*, 53 Tul. L. Rev. 93 (1978).

11. Article 4 of the Civil Code embodies this principle.

12. La. Civ. Code art. 100: "Marriage does not change the name of either spouse. However, a married person may use the surname of either or both spouses as surname." Revision comment (b) to Article 100 states: "Under this Article the legal name of each spouse remains unchanged, although the spouses are entitled to use each other's names as a matter of custom."

13. In short, the "doctrine of unjustified enrichment does not exist for the purpose of remedying hardships created by the operation of the textual provisions of the Civil Code." H.C. Gutteridge & R.J.A. David, *The Doctrine of Unjustified Enrichment*, 5 Camb. L.J. 204 (1934). *See* 2 M. Planiol, Traité élémentaire de droit civil, no. 933 (11th ed. 1959).

14. Tete, *supra* note 9, at 5-6.

15. *Edmonston*, 289 So. 2d at 120.

16. *Id.* at 120.

allowed when there is no other remedy at law, i.e., *the action is subsidiary or corrective in nature.*[17]

Of these elements, the last two—that the enrichment is without cause[18] and that the remedy is subsidiary to claims invoking legislation or custom—go to the heart of the action.

C. *"Without Cause" and "Subsidiary"—Separate Criteria or Redundant?*

With respect to enrichment "without cause," essentially the question is whether the enrichment had a legal basis,[19] that is, whether or not a rule of law or act between the parties supports the plaintiff's transfer of an economic benefit to the defendant. An enrichment lacks legal justification and, accordingly, is without cause when it is based "neither [in] contract nor through a positive provision of the law authorizing the acquisition or protecting it from attack."[20]

Should a valid contract exist, then the obligations flowing from it, pursuant to the parties' mutual intentions and expectations, justify the respective transfers of economic benefits. Thus, when an individual receives a payment due under a contract, his enrichment is not unjust. Rather, it is supported by an agreement that has the force of law between the parties.[21] Similarly, should a rule of law exist to support the transfer, there is no claim of unjust enrichment.

For example, in *G. Woodward Jackson Co. v. Crispens*,[22] G. Woodward Jackson (d/b/a Woodward Jackson Co., Inc.) sued William Crispens and Carl Fontenot to recover the value of his work on a boiler located upon property owned by Mr. Fontenot and leased by Mr. Crispens. Mr. Jackson had contracted with Mr. Crispens and not Mr. Fontenot. Nonetheless, Mr. Jackson alleged that Mr. Fontenot was unjustly enriched by his work and that, as a result, Mr. Fontenot owed him the value of his services. The fourth circuit upheld the trial court's dismissal of the claim, ruling that Mr. Jackson did not show that Mr. Fontenot's enrichment was unjustified or without cause. A rule of law justified Mr. Fontenot retaining the benefit of Mr. Jackson's repairs without paying for them. This rule, as expressed in Articles 2693 and 2694 of the Civil Code, "protects a landlord from having to reimburse the tenant for repairs to the premises *unless* the tenant gives sufficient notice to the landlord of the need for repair and of his intent to have the work

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17. *Id.* (emphasis added).

18. "Cause" in this context is different from the cause necessary to bind persons in the setting of a conventional obligation. *See* La. Civ. Code art. 1966; *Edmonston*, 289 So. 2d at 122.

19. "[T]hat there is no 'justification' is inherent in the definition of 'unjust.'" *Minyard*, 251 La. at 651, 205 So. 2d at 433.

20. Tate, *Unjustified Enrichment*, *supra* note 3, at 887.

21. La. Civ. Code art. 1983: "[C]ontracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith."

22. 414 So. 2d 855 (La. App. 4th Cir. 1982).

performed."[23] The court concluded that the legislature intended to protect lessors (like Mr. Fontenot) from claims by persons (like Mr. Jackson) making repairs to the leased premises that the lessors did not authorize or approve. Hence, Mr. Jackson's impoverishment was not without cause.

To satisfy the without cause element of the *actio*, a plaintiff must show that there is no authority—by legislation, by *conve de in rem versontion*, or by custom—that permits the defendant to retain the benefit he has received. Despite any broader application that the words "unjust enrichment" may suggest, a claim does not arise merely because a transfer of a benefit appears unfair or inequitable. As one commentator has stated,

> An enrichment can never be regarded as unjustified if the defendant is entitled by virtue of some provision of the law either to demand a benefit or to retain it. The doctrine of unjustified enrichment does not exist for the purpose of remedying hardships created by the operation of the textual provisions of the Civil Code.[24]

Finally, the jurisprudence requires the plaintiff claiming unjust enrichment to have no alternative remedy available to him. The subsidiary element prevents persons from pressing the *actio de in rem verso* when a non-equity/quasi-contract cause of action exists to remedy the impoverishment. Thus, when a person may pursue a cause of action in contract or in tort, he may not remedy his injury through a claim of unjust enrichment.[25]

The late Justice Tate[26] and a few other commentators[27] have quibbled with premising the action for unjust enrichment upon Article 21 of the Civil Code of 1870 and challenged the subsidiary color of the claim. The reasons for the subsidiary condition are sound, however, and they include the following: (1) to restrict the courts from eroding the principles of positive law; and (2) to promote the efficient use of judicial resources.[28] Justice Tate suggested that the subsidiary element is actually included within the "without cause" element and, properly speaking, is not a separate requirement.[29] The without cause and the subsidiary elements, however, are distinguishable.

"Without cause" addresses whether there is a legal justification for the enrichment. The court will not entertain a claim of unjust enrichment when a legal rule exists supporting the transfer. The subsidiary element, while somewhat similar

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23. *Id.* at 856 (citing La. Civ. Code arts. 2693-2694).

24. Tate, *Unjustified Enrichment*, *supra* note 3, at 888 (citations omitted).

25. *Minyard*, 251 La. at 652, 205 So. 2d at 433; *Edmonston*, 289 So. 2d at 122.

26. Tate, *Judicial Process*, *supra* note 3, at 458-59.

27. *See* Tate, *Judicial Process*, *supra* note 3, at 457-61; Thomas, *supra* note 3, at 317. *But see* Leon Mazeaud et al., 2 Lecons de droit civil §§ 707-708 (1956); Francois Goré, L'enrichiss ement aux dépens d'autrui § 143, at 153 (1949).

28. Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 Tul. L. Rev. 605, 609, 635 (1962).

29. Tate, *Unjustified Enrichment*, *supra* note 3, at 888-89.

at first blush, properly places the unjust enrichment remedy within the hierarchy of civilian legal doctrine. When the positive law—the paramount authority—addresses an issue, a litigant cannot urge unjust enrichment regarding the same subject-matter as a form of relief either contrary to legislation or custom, as an alternative to legislation or custom, or in combination with legislation or custom. One way to view the landscape of the *actio de in rem verso* is similar to the doctrine of federal preemption. The laws of the states yield in favor of Congress' mandates whenever federal legislation reasonably "occupies the field."[30] In like manner, when the positive law addresses an issue but does not provide a justification for an impoverishment and a corresponding enrichment—providing the genesis for the transfer of a benefit "without cause"—a claim for unjust enrichment should not lie. It does not satisfy the subsidiary test. The legislature, in this situation, addressed this area of law and chose not to authorize a remedy. While a disappointed person's impoverishment is not affirmatively justified by any statute, a tribunal may (and should) reasonably conclude that a claim for unjust enrichment runs counter to the whole of the legislative scheme.

Several commentators have fused two notions into the subsidiary element: (1) a court should reject an unjust enrichment claim when the positive law denies another action that has its factual grounding in the same circumstances as the person pursuing the *actio de in rem verso* has outlined in support of his demand; and (2) a plaintiff may not urge the action where there is another remedy available or when he has, by reason of neglect or error, failed to avail himself of a remedy.[31] A few illustrations may illuminate the issue.

In *Austin v. North American Forest Products*,[32] the plaintiff ("Jack Austin") sought recovery for its losses stemming from its use of defective exterior doors manufactured by North American Forest Products ("North America"). When the court determined that its potential action in redhibition had prescribed, Jack Austin made a demand of unjust enrichment, arguing that its claim met the subsidiary requirement since it had no other remedy.[33] The court, in rejecting Jack Austin's position, held that the existence of the prescribed claim in redhibition prevented any claim for unjust enrichment.[34] Jack Austin could not ignore its legal/contractual remedy (and allow it to lapse) and then prosecute an action based upon equity/quasi-contract.

Similarly, in *Sheets v. Yamaha Motors Corp., U.S.A.*,[35] William Sheets sued Yamaha Motors Corporation, U.S.A. ("Yamaha"), alleging that it misappropriated

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30. *E.g.*, Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 111 S. Ct. 2476 (1991); R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499 (1986).

31. Planiol, *supra* note 13, at no. 937A; Nicholas, *supra* note 28, at 635-36. *See* John P. Dawson, Unjust Enrichment: A Comparative Analysis 106 (1951).

32. 656 F.2d 1076 (5th Cir. 1981).

33. "Austin argues that he is entitled to relief against the manufacturer for unjust enrichment under the law of *Minyard v. Curtis Products, Inc.*" *Id.* at 1087 (citations omitted).

34. *Id.* at 1088-89.

35. 849 F.2d 179 (5th Cir. 1988).

his design modifications to a motorcycle in violation of the Trade Secrets Act of Louisiana.[36] Mr. Sheets, however, had not taken reasonable steps to maintain the secrecy of his work. As a consequence, the Trade Secrets Act did not protect his designs. Undeterred, Mr. Sheets argued that Yamaha had enriched itself unjustly through its alleged misappropriation. The Fifth Circuit upheld the district court's dismissal of Mr. Sheets' claim:

> Louisiana enacted an express statutory scheme to protect individuals and entities in . . . [Mr. Sheets'] position . . . when it adopted the Uniform Trade Secrets Act. Under Louisiana law, . . . [Mr. Sheets] is not entitled to fall back on the equitable doctrine of unjust enrichment . . . . Louisiana law makes clear that when an adequate remedy at law is available, the court may not resort to principles of equity.[37]

Thus, the subsidiary element of the judicially created unjust enrichment test contemplates more than barring a litigant from choosing the unjust enrichment claim from among other potential causes of action. Whenever the legislature speaks on a subject, whether or not a particular litigant has a viable remedy under the legislation, the *actio de in rem verso* is unavailable. A court should not resort to equity/quasi-contract unless "no rule for a particular situation can be derived from legislation or custom."[38] A claim of unjust enrichment is "available merely to remedy the otherwise unaddressed."[39]

The courts' views of the subsidiary element, however, have been less than uniform. This standard, and its interaction with the requirement of without cause, has generated a degree of confusion in the reported decisions.[40] Fortunately, in step with *Edmonston* and its progeny, via Act 1041 of 1995, the legislature has incorporated the criteria developed and accepted in the jurisprudence over the past two decades. Significantly, revised Article 2298 includes the specific notation that the *actio de in rem verso* is subsidiary in nature. Originally, comment (c) to revised Article 2298 read, in part, as follows: "Under Article 2298 . . . recovery for 'enrichment without cause' is no longer a subsidiary remedy."[41] That is incorrect and readers should disregard it.[42] Also, the comment now is consistent with the text.

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36. La. R.S. 51:1431-1439 (1987 and Supp. 1996).

37. 849 F.2d at 184.

38. La. Civ. Code art. 4.

39. Bruce V. Schewe & Kent A. Lambert, *Recent Developments in the Law, 1993-1994—Obligations*, 55 La. L. Rev. 597, 600 (1995).

40. *E.g.*, Roberson Advertising Serv., Inc. v. Winnfield Life Ins. Co., 453 So. 2d 662 (La. App. 5th Cir. 1984). *See* Tate, *Unjustified Enrichment*, *supra* note 3, at 889-90 (citations omitted).

41. La. Civ. Code art. 2298, cmt. c. (West's Louisiana Session Law Service 1995, No. 5).

42. Section 4 of Act 1041 notes that the "comments . . . are not part of the law." *See* Ramirez v. Fair Grounds Corp., 575 So. 2d 811, 813 (La. 1991) (comments have "no . . . effect . . . because they are not part of the law").

D. The Calculation of the Recovery

The second and third paragraphs of revised Article 2298 state that a person successfully pursuing a claim of unjust enrichment recovers the lesser of the impoverishment or the enrichment "measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered." This time measurement for deciding on the amount of recovery in an unjust enrichment case is somewhat unusual.

As a part of the omnibus revamp of the law of obligations in 1984,[43] the legislature pronounced that "[o]bligations . . . arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust enrichment and other facts."[44] The jurisprudence has settled the question when the obligation to repair dictated by Article 2315 of the Civil Code (arising from an offense or quasi-offense) comes into existence: when the tortfeasor causes the harm.[45] Similarly, the obligation due by a person unfairly enriched to a person unjustly impoverished arises independent of the impoverished person instituting a lawsuit. Logic suggests that the person successfully prosecuting the *actio de in rem verso* should receive compensation centered on the date when the obligation came into being, plus interest until satisfied.[46]

However, the redactors of revised Article 2298 did not adopt this approach. Perhaps, the legislature intended to align the unjustly impoverished person's recovery to that of a plaintiff in a tort action—with interest commencing from the time of judicial demand.[47] To soften the sometimes harsh result of this rule, particularly in cases when the defendant in an unjust enrichment suit legitimately (albeit unsuccessfully) contests the plaintiff's entitlement to recover anything, the court may fashion a purely prospective remedy—with its effect dating from the time of the judgment—thereby relieving the defendant of the *pendente lite* interest.[48]

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43. 1984 La. Acts No. 331 (effective Jan. 1, 1985).

44. La. Civ. Code art. 1757.

45. *E.g.*, Thomassie v. Savoie, 581 So. 2d 1031, 1306 (La. App. 1st Cir.), *writ denied*, 589 So. 2d 493 (1991) ("[T]he debt owed by a tort-feasor to the victim . . . accrues at the time the injury is sustained, and not on the date that suit is filed or judgment obtained."); LeBlanc v. American Employers Ins., 364 So. 2d 263 (La. App. 3d Cir. 1978), *writ denied*, 366 So. 2d 916 (1979); Holland v. Gross, 195 So. 828 (La. App. 2d Cir. 1940).

46. La. Civ. Code art. 2000. *See* Bruce V. Schewe, *On Obligations to Pay Money with a View Toward Stipulated Remedies and Usury*, 44 La. L. Rev. 151 (1983).

47. La. R.S. 13:4203 (1991).

48. The calculation of interest from the date of judicial demand may result in a harsher than appropriate burden on litigants defending against the unjust enrichment claim. Perhaps the legislature has reserved the interest incentive to settle for tort cases. In those suits, the theory supporting the claim, the idea that the defendant injured another by his *fault*, supports the idea of interest accruing from the judicial demand.

E. Placing the Action in Perspective

Three decisions may assist in charting the parameters of and the potential problems with the *actio de in rem verso*. These cases illustrate how the courts in Louisiana have sought to reconcile the more technical requirements of the claim/remedy with the broad equitable concept of unjust enrichment.

1. There Is No Claim of Unjust Enrichment when Relief Is Contrary to the Thrust of Positive Law, Custom, or Contract

Charrier v. Bell[49] highlights the limitation of the *actio de in rem verso* when it runs counter to legislation, particularly imperative law.[50] Leonard Charrier excavated and obtained possession of almost two and one-half tons of Tunica Indian artifacts from a burial ground located near the Louisiana State Penitentiary at Angola. Mr. Charrier admitted that he entered the site and conducted his work without anyone's permission. Eventually, while engaged in an effort to sell the artifacts, Mr. Charrier filed a suit seeking a judicial declaration that he owned the artifacts. The first circuit upheld the trial court's conclusions that Mr. Charrier did not own the items and that they were the property of the Tunica Indian Tribe.[51]

In an attempt to recover compensation for his time and expenses in excavating the artifacts, Mr. Charrier argued that the Tunica Indians were unjustly enriched to his detriment.[52] The court questioned whether the Tunica Indian Tribe had received an enrichment because, although it had the proceeds from the sale of the artifacts, Mr. Charrier's activities had caused "substantial upset over the ruin of 'ancestral burial grounds.'"[53] Moreover, Mr. Charrier could not establish that he was impoverished since he undertook his work with the knowledge that he did not have permission from anyone (including the owners of the property) to make his explorations. The element of impoverishment is not present when the person seeking a remedy has "helped another through his own negligence or fault or through action taken at his own risk."[54]

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49. 496 So. 2d 601 (La. App. 1st Cir. 1986).

50. Professor Garro has offered the following summary regarding suppletive and imperative legislation:

> Roman legal literature distinguished between rules of *jus cogens*, which could not be derogated from by the parties, and *just dispositivum*, which could be set aside by contrary agreement. . . . Hence, all that the law does not command nor prohibit is abandoned to the free will of the parties and is permitted.

Alejandro M. Garro, *Codification Technique and The Problem of Imperative and Suppletive Laws*, 41 La. L. Rev. 1007, 1007 (1981). *See* La. Civ. Code art. 7.

51. 496 So. 2d at 605-06.

52. *Id.* at 606. Mr. Charrier urged that "he [was] entitled to recover a sum of money to compensate his services and expenses on the basis of an *actio de in rem verso*." *Id.*

53. *Id.*

54. *Id.* at 607.

Also, the court addressed whether Mr. Charrier's alleged impoverishment was justified. The Tunica Indian Tribe had a right to prevent the "disinterment of their deceased relatives"[55] and a right to damages for the desecration of the graves.[56] As a consequence, that "right would be abrogated if descendants were obliged to reimburse for the expense of the excavation."[57] There was, accordingly, "legal justification for any enrichment received by the Tribe."[58]

Although Mr. Charrier conducted the operations which recovered the artifacts, he failed in his demand for compensation. The court properly noted the paramount interest of imperative legislation and that any award in Mr. Charrier's favor would turn these statutes on their heads. Since Mr. Charrier's allegation of impoverishment was contrary to the positive law, he could not press the *actio de in rem verso* regardless of his ostensible entitlement under the other elements of the claims or the apparent unfairness of his uncompensated work.[59]

2. *There is No Claim for Unjust Enrichment when the Positive Law Reasonably Addresses the Situation*

Orleans Onyx, Inc. v. Buchanan[60] concerned the furnishing and installing by Orleans Onyx, Inc. ("Orleans Onyx") of certain products in a bathroom of a house owned by Edward Brennan. Orleans Onyx did not contract with Mr. Brennan. Instead, it had dealt with Charles Buchanan who, at the time, anticipated purchasing the property. That sale fell through, and Mr. Buchanan did not pay Orleans Onyx for all of its work or supplies. Orleans Onyx filed a lien against the property under the Private Works Act[61] and, thereafter, sued Mr. Brennan to collect the balance due under its contract with Mr. Buchanan. The fifth circuit affirmed the district court's dismissal of Orleans Onyx's action under the Private Works Act.[62] The court, however, looked favorably upon Orleans Onyx's alternative argument that it should prevail on a claim of unjust enrichment.[63] The court noted that Orleans Onyx's materials and services improved Mr. Brennan's property for which Orleans Onyx had not received full compensation. The court also recognized the lack of privity of contract between Mr. Brennan and Orleans Onyx. Because Orleans Onyx had no recourse under the Private Works Act, there was "an absence of justification and [Orleans Onyx] ha[d] no other remedy at law."[64]

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55. *Id.*
56. La. R.S. 8:653-654 (1986); La. R.S. 14:101 (1986).
57. 496 So. 2d at 607.
58. *Id.*
59. In short, Mr. Charrier's impoverishment was a self-inflicted and illegal wound.
60. 428 So. 2d 841 (La. App. 5th Cir. 1983).
61. La. R.S. 9:4801-4842 (1991 and Supp. 1996).
62. 428 So. 2d at 844. The court stated that, in the light of the lack of privity between Orleans Onyx and Mr. Brennan, the Private Works Act does not "provide[] a basis for enforcement of the lien . . . ." *Id.*
63. *Id.* at 845.
64. *Id.*

The fifth circuit turned to the doctrine of unjust enrichment to correct what it perceived as a manifestly unfair situation. In doing so, however, the court overlooked a legal remedy available to Orleans Onyx. Article 496 of the Civil Code[65] addresses the ownership of improvements to immovables, or component parts, and the concomitant duties and liabilities. When a good faith possessor of an immovable makes an improvement upon the property, the owner of the immovable must keep the improvement and pay the possessor the cost of the improvement, the current value of the improvement, or the enhanced value of the immovable.[66] Mr. Brennan had full knowledge that Orleans Onyx was making improvements to his property under a contract with his prospective buyer (Mr. Buchanan). Mr. Brennan had permitted Mr. Buchanan to have access to the property specifically so that he could contract for the improvements made by Orleans Onyx. Thus, the unjust enrichment claim was not the only remedy open to Orleans Onyx. The legislature had addressed the issue of the ownership of improvements to immovables and the attendant liability of the owner. The court should have resolved the dispute by interpreting Article 496 of the Civil Code to afford Orleans Onyx relief. This is different than the court concluding that Orleans Onyx's impoverishment was without cause. Orleans Onyx made a transfer to Mr. Brennan as a consequence of its *valid* contract with Mr. Buchanan. Yet, the positive law required Mr. Brennan to compensate Orleans Onyx. The decision serves as a caution to remind the courts that, before invoking the principle of unjust enrichment in confronting what they perceive as unjust circumstances, they should exhaust the positive law.

3. *The* Actio De In Rem Verso *Fits Well into Contractual Error Scenarios and Should Replace the Doctrine of Quantum Meruit*

In contrast, the supreme court's decision in *Morphy, Makofsky & Masson, Inc. v. Canal Place 2000*[67] presents a clearer picture of what should be the subsidiary nature of the *actio de in rem verso*. Morphy, Makofsky & Masson, Inc. ("MMM") was a sub-subcontractor that performed engineering services for a sub-contractor of Canal Place 2000, CBM Engineers, Inc. ("CBM"). CBM requested MMM's services, but CBM and MMM never came to an agreement about the amount or method of payment.[68]

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65. La. Civ. Code art. 496:
> [W]hen construction, plantings, or works are made by a possessor in good faith, the owner of the immovable may not demand their demolition and removal. He is bound to keep them and at his option pay to the possessor either the cost of the materials and of the workmanship, or their current value, or the enhanced value of the immovable.

66. La. Civ. Code art. 496. Article 466 defines "things permanently attached to a building" as component parts.

67. 538 So. 2d 569 (La. 1989).

68. *Id.* at 572-73.

MMM sued CBM, seeking remuneration for its engineering services. The trial court, upon finding that MMM and CBM did not perfect their agreement, concluded that an equitable award "under quasi-contract or *de in rem verso*, an action in unjust enrichment"[69] was in order. On appeal, the fourth circuit affirmed the trial court's judgment and relied upon the unjust enrichment theory.[70] The Supreme Court of Louisiana granted MMM's request for a writ of certiorari.

The court concluded that MMM and CBM had entered into a valid oral agreement under Article 1779 of the Civil Code of 1870.[71] Additionally, the court commented that "at the very least an implied in fact contract existed between the parties" which has the same effect as a formal agreement.[72] Despite MMM and CBM not agreeing on a price for MMM's services, "the law in this situation implies a provision that . . . [MMM] would be paid a reasonable sum."[73] In assessing what was a "reasonable sum," the court rejected the use of the impoverishment/enrichment analysis of the *actio de in rem verso*, noting that a claim for unjust enrichment was unavailable to MMM "because there exists . . . an independent remedy at law, that is, in contract."[74]

The court's reluctance to turn to the *actio de in rem verso* is puzzling. Rather than stretch or rewrite the positive law concerning the letting out of services,[75] or invoke the rules of obligations when the more specific legislation relative to leases should govern,[76] the court may have used the unjust enrichment doctrine to fashion a remedy for MMM.

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69. *Id.* at 571.

70. 522 So. 2d 1223, 1226 (La. App. 4th Cir. 1988) (citing Fullerton v. Scarecrow Club, Inc., 440 So. 2d 945 (La. App. 2d Cir. 1983); Jones v. City of Lake Charles, 295 So. 2d 914 (La. App. 3d Cir. 1974)).

71. Article 1779 set out four requisites: "1. Parties legally capable of contracting. 2. Their consent legally given. 3. A certain object, which forms the matter of agreement. 4. A lawful purpose."

72. 538 So. 2d at 573.

73. *Id.* at 574. Benglis Sash & Door Co. v. Leonards, 387 So. 2d 1171, 1172-73 (La. 1980), evidences a similar judicial leap:

> [I]t is not essential that the specific sum of the sales price be stated at the time of contracting. The parties can agree that the price may be ascertained by computation or that the price may be fixed by arbitration. Or the parties can consent to buy and to sell a certain thing for a reasonable price, and when they do, the contract of sale has been perfected. The essential thing is that there be a meeting of the minds . . . as to price.

This type of judicial deconstruction of statutes is suspect. "When the Legislature has set forth the fundamental elements of the contracts of sale and lease—and has included price in each—it is troubling for the bench, in an effort to achieve an ostensibly fair result in an isolated lawsuit, to rule that price is not truly a necessary ingredient of the consent of the parties." Bruce V. Schewe, *Recent Developments in the Law, 1988-1989—Obligations*, 50 La. L. Rev. 321, 327 (1989).

74. 538 So. 2d at 574-75.

75. Article 2756 of the Civil Code clearly requires a price: "To build by a plot, or to work by the job, is to undertake a building or a work for a certain stipulated price." *See* La. Civ. Code arts. 2670, 2671 & 2675.

76. Article 2668 of the Civil Code admonishes the reader to employ the provisions Title IX—of lease—in preference to the general articles of obligations.

This case dramatizes one setting in which the *actio de in rem verso* is proper: when an action on a contract is not available because persons to the putative agreement did not comply with the imperative positive law.[77] Professor Nicholas has listed a number of illustrations in this category including the following: "an agent exceed[ing] his authority and thereby confer[ing] a benefit on the principal; or a builder perform[ing] work for a municipality in execution of an agreement which was made in good faith but which was void for noncompliance with certain requirements imposed by statute on contracts with public authorities."[78] Since the parties did not, by definition, perfect their agreement—but they acted as if they had—there is neither a cause for the transfer (enrichment/impoverishment) of things/services from one to the other nor a redress for the situation. Often the courts resolve these difficulties through the doctrine of quantum meruit.[79] The unjust enrichment remedy, however, seems more appropriate for at least two reasons: its tradition is more compatible with the civilian foundation in Louisiana;[80] and, more importantly, it is now a matter of the positive law.[81]

In this context, good faith in the contractual error seems to be a sub-element of the unjust enrichment claim.[82] One purpose of the legislative requirements for the formation of contracts is to encourage persons to meet those standards. Should one or both of the parties to an unenforceable "agreement" err in good faith, however, the principle of unjust enrichment demands that the party receiving the benefits of the failed bargain may not "deny any payment at all."[83]

F. Conclusion

The *actio de in rem verso* is an effective tool that allows the courts to compensate particular persons in particular circumstances to avoid manifest injustice when the primary sources of law do not reasonably control. The action, however, is not a general charge for the courts to dispense equity as they see fit.

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77. *E.g.*, State v. City of Pineville, 403 So. 2d 49 (1981); Coleman v. Bossier City, 305 So. 2d 444 (1975); Sylvester v. Town of Ville Platte, 218 La. 419, 49 So. 2d 746 (1950); Smith v. Town of Vinton, 216 La. 9, 43 So. 2d 18 (1949); Boxwell v. Department of Highways, 203 La. 760, 14 So. 2d 627 (1943); North Dev. Co. v. McClure, 276 So. 2d 395 (La. App. 2d Cir. 1973).

78. Barry Nicholas, *The Louisiana Law of Unjustified Enrichment Through the Act of the Person Enriched*, 6/7 Tul. Civ. L.F. 3, 20 (1991-92).

79. *E.g.*, *Coleman*, 305 So. 2d at 444; Corbello v. Jefferson Davis Parish Police Jury, 262 So. 2d 151 (La. App. 3d Cir. 1972); Pugh v. Town of Logansport, 235 So. 2d 226 (La. App. 2d Cir. 1970). *See* Suzanne A. Burke, *Quantum Meruit in Louisiana*, 50 Tul. L. Rev. 631 (1976).

80. Suzanne Burke has characterized the claim as an "alien action," Burke, *supra* note 79, at 654, imported from the common law really without rhyme or reason.

81. The proposition is self-evident that the legislature's enactment of revised Article 2298 should preempt and suppress a judicially created form of relief that attempts to address the same subject-matter of problems.

82. Nicholas, *supra* note 78, at 22. *See* Vernon V. Palmer, *Contractual Negligence in the Civil Law—The Evolution of a Defense to Actions for Error*, 50 Tul. L. Rev. 1, 40-46 (1975).

83. *Coleman*, 305 So. 2d at 446.

In order to prevent any "fraud on the law"[84] and to curb any tendency for equity to swallow the general rules of the Civil Code, not to mention the contractual terms of bargains governed by the law of Louisiana, the courts should remain cognizant of the specialized requirements to the claim. Those specialized requirements are detailed in revised Article 2298 of the Civil Code.

84. *Minyard*, 251 La. at 651, 205 So. 2d at 433.